8035 HIGHWAY OR SIDEWALK DEFECT OR INSUFFICIENCY

Every municipality has the duty to exercise ordinary care to construct, maintain, and repair its (highways) (sidewalks) so that they will be reasonably safe for public travel. This duty does not require the municipality to guarantee the safety of its (highways) (sidewalks) or render them absolutely safe for all persons who travel upon them. It is sufficient if they are constructed (and) (maintained) so as to be reasonably safe.

A (highway) (sidewalk) is defective when it is not (constructed) (maintained) so as to be reasonably safe for anticipated public use.

(However, before you may find (municipality) negligent because of the existence of a defective condition, you must first find that (municipality) through its officers or employees had either actual notice of the defect, or constructive notice, because the defect had existed for such a length of time before the accident that the municipality through its officers and employees in the exercise of ordinary care should have discovered it in time to remedy the defect.)

You may consider the topography and development of the locality (the standard of sidewalk construction which this part of the municipality had attained), as well as the amount and character of traffic on the (highway) (sidewalk) and the intended use of the (highway) (sidewalk) by the public.

COMMENT

This instruction was approved in 1974 and numbered Wis JI-Civil 1029. It was renumbered in 1985. Editorial changes were made in 1994. The instruction and comment were updated in 2004. The comment was updated in 2015 and 2021.

The Committee believes that claims for insufficiency or want of repairs of a roadway remain viable under Wis. Stat. § 893.80(4) and Holytz v. Milwaukee, 17 Wis.2d 26, 115 N.W.2d 618 (1962). However, governmental immunity, under Holytz, supra, may bar some claims. The Supreme Court has also intimated that in abolishing municipal tort immunity, Holytz, provides an independent basis for proceeding in these actions. Schwartz v. City of Milwaukee, 43 Wis.2d 119, 123, 168 N.W.2d 107 (1969); Schwartz v. City of Milwaukee, 54 Wis.2d 286, 288-89, 195 N.W.2d 480 (1972). The court stated, at 54 Wis.2d 288-89, that:

...sec.81.15 might as well be repealed by the legislature since its purported language creating a cause of action has been supplanted by Holytz v. Milwaukee . . .

This language was cited with approval in Morris v. Juneau County, 219 Wis.2d 543, 555, 579 N.W.2d 618 (1962).

Prior to being amended in 2012, Wis. Stat. § 893.83(1) (formerly numbered Wis. Stat. § 81.15) provided a separate standard for municipal liability for highway defect claims. The statute provided that a municipality may be held liable for damages of up to $50,000 that "happen to any person or his or her property by reason of the insufficiency or want of repairs of any highway that any town, city, or village is bound to keep in repair." Under this statutory provision, a municipality was not liable for damages sustained by reason of an accumulation of snow or ice upon a bridge or highway, unless the accumulation existed for three weeks or more. The court in Morris held that these types of claims were not subject to discretionary immunity.

However, in 2012, the legislature eliminated the separate standard for claims based on highway defects. Following the enactment of 2011 Wisconsin Act 132 [effective date: April 5, 2012], claims based on highway defects are subject to the grant of discretionary immunity found in Wis. Stat. 893.80, as well as all the procedures found in that statute. Additionally, the legislature has provided that highway defect claims may not go forward if they are based on an accumulation of snow or ice, unless that accumulation has existed for three weeks or more. The court of appeals has interpreted the amended § 893.83 as providing that snow and ice accumulations claims are absolutely barred if the accumulation existed for less than three weeks, and that they are subject to the grant of discretionary immunity found in Wis. Stat. § 893.80 if the accumulation existed for three weeks or more. Knoke v. City of Monroe, 2021 WI App 6, 395 Wis.2d 551, 953 N.W.2d 889.